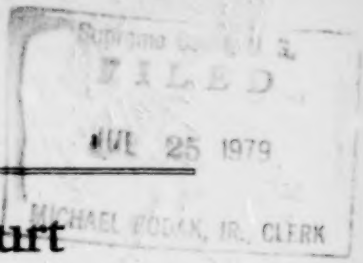

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 78-1896

ROBERT KAHN, NOEL PERRY, STANLEY NAPARST,
Petitioners,

VS.

EAST BAY MUNICIPAL UTILITY DISTRICT,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN B. REILLEY,
General Counsel
ROBERT C. HELWICK,
Attorney
EAST BAY MUNICIPAL
UTILITY DISTRICT
2130 Adeline Street
Oakland, California 94623
Telephone: (415) 835-3000
Attorneys for Respondent.

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

Statutes

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 78-1896

ROBERT KAHN, NOEL PERRY, STANLEY NAPARST,
Petitioners,

vs.

EAST BAY MUNICIPAL UTILITY DISTRICT,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent East Bay Municipal Utility District ("Respondent") opposes the Petition of Robert Kahn, Noel Perry, and Stanley Naparst ("Petitioners") for a writ of certiorari to review the judgment and opinion of the California Supreme Court rendered on March 27, 1979, in the case entitled *East Bay Municipal Utility District v. The Appellate Department of the Superior Court [Robert Kahn, Stanley Naparst, and Noel E. Perry, real parties in interest]*.

JURISDICTION

This Court should not assume jurisdiction in that, as discussed below, the Petition raises issues which were not before the California Supreme Court and were therefore

not addressed in the opinion of which Petitioners seek review. Similarly, Petitioners' Statement of the Case does not make the requisite showing that federal issues were timely and properly raised so as to give this Court jurisdiction over the subject matter. U.S. Supreme Court Rule 23(1)(f). Petitioners' noncompliance with the pertinent rules which establish jurisdiction is further illustrated by their complete failure to provide this Court with a verbatim text of the California statute which is being challenged in the Petition. U.S. Supreme Court Rule 23(1)(d). Ultimately, jurisdiction must be denied on grounds that the Petition does not set forth an actual conflict between the California Supreme Court's opinion and the decisional law of this Court. U.S. Supreme Court Rule 19(1)(a).

QUESTION PRESENTED

Does California Elections Code Section 10012.5 constitutionally authorize local governments to charge nonindigent candidates for the service of publishing their personal qualifications for the political office they seek.

COUNTERSTATEMENT OF THE CASE

Respondent is a local public agency created under the California Municipal Utility District Act (California Public Utilities Code Sections 11501, et seq.); and delivers a water supply for the domestic, industrial, and fire protection needs of approximately 1,100,000 residents in the urban communities of Alameda and Contra Costa counties. Respondent is governed by a publicly elected Board of Directors consisting of seven members.

Petitioners were each candidates for Respondent's Board of Directors in the California general election held on November 5, 1974. Pursuant to California Elections Code Section 10012.5 (now Section 10012), Petitioners each submitted a "statement of qualifications" to Respondent requesting that it be printed in the voter's pamphlet which is mailed to the local electorate together with the sample ballot.[1] Petitioners Kahn and Naparst also requested that a Spanish translation of their statement of qualifications be printed in the voter's pamphlet.

Petitioners' statements of qualifications were duly printed and distributed to the voters within Respondent's service area. After the election, Respondent billed Petitioners for payment of $1,300 by candidate Kahn, of $1,300 by candidate Naparst, and $650 by candidate Perry; each amount represents the candidate's pro rata share of the cost of printing, handling, and (as to Petitioners Kahn and Naparst) translating the statements of qualifications.

Petitioners declined to pay any portion of such billing and Respondent filed Action No. 290596 in the Municipal Court for the Oakland-Piedmont Judicial District, County

---

[1]Former California Elections Code Section 10012.5 provides that each candidate for elective office in any local agency, including a district, may prepare a statement of qualifications which "shall" be sent by the clerk to each voter in a voter's pamphlet, together with the sample ballot. The section requires that the clerk "shall provide a translation [of the statement] to those candidates who wish to have one, and shall select a person to provide such translation from the list of approved Spanish language translators and interpreters of the superior court of the county or from an institution accredited by the Western Association of Schools and Colleges." Section 10012.5 further provides that "the local agency may bill each candidate availing himself of these services a sum no greater than the actual prorated costs of printing, handling, and translating the candidate's statement, if any, incurred by the agency as a result of providing this service."

of Alameda ("the trial court") naming Petitioners as defendants. Respondent's complaint sued for recovery from said defendant candidates of the prorated cost which Respondent billed to them (pursuant to Section 10012.5) for the printing, handling and translation of their statements of qualifications. The trial court entered its Judgment in favor of Respondent awarding recovery of said statement costs, as billed, from Petitioners.

Petitioners appealed said judgment to the Appellate Department of the Superior Court of the State of California for the County of Alameda ("the Superior Court"). Petitioners' appeal of the trial court's judgment was raised on essentially two grounds: (1) that candidates wishing to have their statements of qualifications published in Spanish should be allowed to provide their own translations; and (2) that requiring the candidates to pay for the costs of distributing the statements is a denial of constitutional rights. App. D of Petition at p. 47.

In its Decision on Rehearing the Superior Court rejected the first of these two contentions and concluded that the California Legislature clearly had a valid interest in enacting requirements that ensure the proper quality of Spanish translations through the clerk's use of accredited translators (Section 10012.5). On the second contention raised by Petitioners' appeal, the Superior Court reversed the trial court's judgment on the grounds that although local agencies are authorized by Section 10012.5 to *bill* candidates for the statement of qualifications costs, subsequent *collection* actions to recover such costs run afoul of the equal protection provisions of the Federal Constitution. App. D of Petition at pp. 47-53.

Respondent petitioned to the Supreme Court of the State of California for a writ of certiorari to review the Superior Court's reversal of the trial court's judgment. Upon review, the California Supreme Court concluded that the Superior Court had acted in excess of jurisdiction by its failure to comply with directions contained in California Elections Code Section 10012.5, and the rule of law established by the Supreme Court in *Knoll v. Davidson* (1974) 12 C.3d 335.[2] It therefore annulled the Superior Court's decision and directed that the trial court's judgment in favor of Respondent be affirmed. App. A of Petition at pp. 16 (fn. 3), and 23.

Petitioners now seek review of the California Supreme Court's decision on grounds that the State may not constitutionally collect from candidates the cost of publishing their statements of qualifications.

ARGUMENT

PETITIONERS HAVE FAILED TO ESTABLISH GROUNDS UPON WHICH TO GRANT REVIEW OF THIS CASE

A. The Petition Raises New Issues Which Were Neither Before the California Supreme Court nor Addressed in the State Court's Opinion

The Petition before this Court is misleading in that it raises issues which were not under consideration by the California Supreme Court, were not a part of that Court's

[2]In *Knoll v. Davidson* (discussed intra) the California Supreme Court ruled that local government has a legitimate state interest in collecting the cost of providing the statement publication service to the candidates.

decision, and are therefore not within the jurisdiction of the United States Supreme Court. U.S. Supreme Court Rule 23(1)(f).

At this late stage of the proceedings, Petitioners seek to revive the Spanish translation issue which was laid to rest by the decision of the Superior Court. As outlined in the preceding Counterstatement of the Case, the Superior Court expressly addressed Petitioners' contention that the defendant candidates should have been permitted to submit their own translations rather than having to comply with the translation provisions of Elections Code Section 10012.5. In the words of the Superior Court:

> "The first contention (which involves only an unspecified portion of the judgment covering the translation expense) would deny the right of the Legislature to ensure a proper quality of translation through the use of accredited translators. Erroneous translation reflects adversely on the governmental agency which issues the pamphlet. Many voters will assume that the agency is responsible for the translation; and any offense they take from inaccurate or perhaps ludicrous and possibly even insulting errors in translation might be directed at the governing agency rather than the candidate. In addition, the clerk's statutory responsibility to reject obscene, vulgar, profane, libelous, etc., matter requires the use of translators accountable to him. The Legislature clearly had a valid interest in enacting this requirement. The first contention is not well taken." App. D of Petition at p. 47.

As stated in its petition for review to the California Supreme Court, Respondent fully concurred with the Superior Court's resolution of this translation issue and did *not* raise the translation provisions of Elections Code

Section 10012.5 anew in its petition. Petition for Writ of Certiorari filed by Respondent in the California Supreme Court on September 12, 1977, at p. 10.

Moreover, by the very nature of the state certiorari proceedings, the Supreme Court of California was limited to the issue of whether or not the Superior Court had exceeded its jurisdiction by failing to follow the case law of *Knoll v. Davidson,* supra, which specifically authorizes collection of statement of qualifications costs. App. A of Petition at p. 16, fn. 3.[3] Under California law, certiorari lies only to determine whether the court to whom the writ is directed has exceeded its jurisdiction. Certiorari does not apply to review a purportedly erroneous judgment which a lower court had jurisdiction to render. California Code of Civil Procedure Section 1068; *Estrin v. Superior Court* (1940) 14 C.2d 670, 674-675. Petitioners are asking this Court to review issues which were not before the California Supreme Court; the propriety of the Superior Court's determination of the translation issue was not raised and was not within the scope of the Supreme Court's certiorari proceedings.

Finally, Petitioners' reference to the Federal Voting Rights Act has no relevance whatsoever to this case. 42 U.S.C. Section 1973 (f)—which was not raised as a federal question before the California Supreme Court but is relied

[3]Although a court may have jurisdiction over the subject matter and the parties in an action, it nevertheless acts in excess of jurisdiction where it does not follow the mandate of a statute or a rule of decisional law of a higher court requiring that it exercise its power over the parties and the cause in a particular manner. *Yoakum v. Small Claims Court* (1975) 53 C.A.3d 398, 401-402.

upon and cited in the Petition at pages 5 and 7—provides only for the assignment of observers at elections.

Assuming that Petitioners' unspoken intent is to rely upon the bilingual election requirements of 42 U.S.C. Section 1973 aa-la (which, again, Petitioners did *not* address to the California Supreme Court), it requires little discussion to clarify that these requirements were not adopted by Congress until August 1975 and manifestly do not apply to the November 1974 election which is the subject of the Petition herein. It is further noted that since the enactment of the Federal Voting Rights Act of 1975, Spanish voting materials pertaining to Respondent's elections have been provided to the Spanish speaking electorate in full compliance with the federal statute.

B. Petitioners' Constitutional Challenge of California Elections Code Section 10012.5 is Without Merit.

The constitutionality of the billing provisions of Elections Code Section 10012.5 was first addressed by the California Supreme Court in *Knoll v. Davidson,* supra. In *Knoll v. Davidson* the Court announced that a local agency may not constitutionally require payment of costs as a *prerequisite* to publication of a candidate's statement of qualifications. Such a prepayment requirement, the Court concluded, would invidiously discriminate against poor candidates in violation of the equal protection clause. Id. at p. 351.

However, the Court upheld the billing provisions of Section 10012.5 explaining that the statute does not authorize a prepayment requirement, *but constitutionally permits the local agency to bill candidates the actual cost of publishing*

the statements of qualifications after this service has been provided. Applying the word "shall", as used in the Section, the Court underscored that once a candidate requests publication of his or her statement in the voter's pamphlet, the clerk does not have discretion with respect to inclusion of the statement of qualifications. Rather, without regard to wealth, "section 10012.5 *compels* the local agency to include in the voter's pamphlet each candidate's statement of qualifications. . . ." Id. at pp. 352-353.

In its recent affirmation of the *Knoll v. Davidson* holding, the California Supreme Court has expressly refuted Petitioners' contention that the words "may bill" in Section 10012.5 do not authorize local agencies to enforce collection of such billings by legal action. The Court reiterates from its previous decision:

> " 'It appears clear that *the county need not be compelled to pay the cost of providing this service* of printing and mailing candidates' statements of qualifications and that, as indicated in [*Bullock v. Carter* (1972) 405 U.S. 134], the county has a legitimate state interest in *collecting* the actual cost of providing such a service'." App. A of Petition at pp. 18-19.

Petitioners have utterly failed to present a basis for this Court to assume jurisdiction over this case. The Petition does not present a new federal question, nor does it establish that the California Supreme Court's opinion conflicts with the applicable decisions of this Court. U. S. Supreme Court Rule 19 (1)(a).

The California Court answered directly Petitioners' claim that collection of statement of qualifications costs denies candidates equal protection of the laws:

> "Inequality is eliminated when all candidates are permitted to make a statement of qualifications without

prepayment. Equal protection does not further require candidates be relieved of their pro rata costs of publication any more than they are entitled to relief from other personal costs of candidacy." App. A of Petition at p. 18.

It is particularly significant, as noted in the California Supreme Court's opinion, that this is not a case in which Petitioners seek to avoid payment of lawful obligations on grounds of indigency or other inability to pay. None of the petitioners herein claim they are without the financial means to pay their pro rata share of the proper costs. App. A of Petition at p. 16, fn. 2. Furthermore, having fully participated in the 1974 election (and having filed statements of qualifications for publication) Petitioners cannot assert that they were in any way discouraged from "political participation" by the prospect of paying their pro rata share of the statement publication services.

In the final analysis, the thrust of Petitioners' argument is that all candidates, regardless of their wealth or the size of their campaign treasuries, are entitled to a free ride from what the California Supreme Court has concluded is a campaign expense—the "cost of publicizing personal qualifications for the office one seeks". App. A of Petition at p. 22. This Court recently established in *Buckley v. Valeo* (1976) 424 U.S. 1, 97-102, that equal protection does not require that government must finance the campaigns of political candidates. (See also App. A of Petition at p. 21, fn. 6).

Petitioners' reliance upon *Lubin v. Panish* (1974) 415 U.S. 709 and *Bullock v. Carter* (1972) 405 U.S. 134, simply does not support their broad constitutional assertions. The

California Supreme Court best summarized the failings of Petitioners' constitutional arguments when it said:

> "If it is real parties' [Petitioners'] contention the regulation denies them or electors access to the ballot, the contention is equally without merit. Here there is no denial of access to the electoral process, as in the case of laws requiring a candidate to satisfy certain conditions in order to place his or her name on the ballot. (See *American Party of Texas v. White* (1974) 415 U.S. 767; *Storer v. Brown* (1974) 415 U.S. 724; *Lubin v. Panish* (1974) 415 U.S. 709). Such requirements constitute 'direct burdens not only on candidate's ability to run for office but also on the voter's ability to voice preferences regarding representative government and contemporary issues.' (*Buckley v. Valeo,* supra, 424 U.S. 1, 94.) Here, as in *Buckley,* the government's refusal to pay candidate campaign costs 'is not restrictive of voters' rights and less restrictive of candidates'. (Id.) The regulation 'does not prevent any candidate from getting on the ballot or any voter from casting a vote for the candidate of his choice. . . .' (Id.) Our holding in *Knoll v. Davidson,* supra, 12 Cal. 3d 335 disallows any legitimate claim that former Elections Code Section 10012.5 denies real parties [Petitioners] access to the ballot." App. A of Petition at pp. 21-22.

CONCLUSION

The California Supreme Court properly decided this case and did so in full accord with the decisional law of this Court. The opinion annulling the decision of the Superior

Court and reaffirming the trial court's Judgment should stand as rendered, and the Petition for a Writ of Certiorari should be denied.

July 24, 1979.

Respectfully submitted,

JOHN B. REILLEY,
General Counsel
ROBERT C. HELWICK,
Attorney
EAST BAY MUNICIPAL
UTILITY DISTRICT
Attorneys for Respondent.